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No. 90-182

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM 1990

V-1 OIL COMPANY,
Petitioner,

v.

STEVEN P. GERBER,
*Respondent and
Cross-Petitioner*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is Respondent Gerber, who made a warrantless inspection of underground storage tanks at a retail gasoline station, entitled to claim qualified immunity from suit under 42 U.S.C. §1983, based upon extraordinary circumstances?

LIST OF PARTIES

V-1 Oil Company, a Wyoming corporation, brought this matter before the United States Supreme Court on a petition for writ of certiorari.

Steven P. Gerber is named in his individual capacity as the Respondent. Mr. Gerber has also brought this matter before the United States Supreme Court on a cross-petition for writ of certiorari, which is filed separately.

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**BRIEF IN OPPOSITION TO V-1 OIL COMPANY'S PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Respondent Steven P. Gerber respectfully requests that the Petition for Writ of Certiorari of Petitioner V-1 Oil Company be denied, and that no further review of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on April 30, 1990 be made.

OPINIONS BELOW

On September 28, 1988, the U.S. District Court for the District of Wyoming issued its decision in this matter, which has been recorded at 696 F.Supp. 578 (D. Wyo. 1988). V-1 Oil Company appealed the decision of the District Court to the Tenth Circuit to the Court of Appeals. The opinion of the Court of Appeals is reported at 902 F.2d 1482 (10th Cir., 1990). A copy of the Tenth Circuit opinion has been attached

to the Petitioner's Petition for Writ of Certiorari as Appendix A. A copy of the opinion of the U.S. District Court is attached to the Petitioner's Petition for Writ of Certiorari as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). V-1 Oil Company's Petition for Writ of Certiorari was filed in the U.S. Supreme Court on July 23, 1990. It was received by the Respondent at the Office of the Wyoming Attorney General on July 23, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

WYO. STAT. §35-11-109 (Supp. 1988)

Powers and duties of director.

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal business office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or non-compliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment

shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The Department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section.

STATEMENT OF THE CASE

On April 28, 1988, at a retail gasoline station owned by Petitioner V-1 Oil Company in Lander, Wyoming (hereinafter "the V-1 station"), Steven P. Gerber made an inspection of underground storage tanks.

Mr. Gerber is the Northwest District Supervisor for the Wyoming Department of Environmental Quality, Water Quality Division. His duties include investigating discharges of pollution, including petroleum products, into surface water or groundwater within the State in order to determine if the Wyoming Environmental Quality Act has been violated. Mr. Gerber was aware that the V-1 station was a potential source of gasoline pollution, because samples of groundwater which had been taken from wells located hydrologically downgradient from the V-1 station had revealed the presence of gasoline product.

The V-1 station, a self service gasoline station which sells gasoline to retail customers, is open to the public during normal business hours from 7:00 a.m. until 9:00 p.m. daily. In addition to selling gasoline, the V-1 station also sells liquid propane and groceries and operates a video movie rental business.

When Steve Drake, an employee of V-1 Oil, came on duty at the station at 3:00 p.m. on April 28, 1988, Rick Evans, the station manager, told Mr. Drake to notify him if anyone wanted to "look at dirt or whatever" and that "DEQ might come by and look at it." At approximately 8:20 p.m., Mr. Gerber, acting on the advice of an assistant attorney general for the State of Wyoming, walked onto the V-1 station premises, identified himself as an employee of the DEQ and

advised Mr. Drake that he was there to conduct an inspection of the premises pursuant to state statute.

Mr. Gerber inspected the area where the underground storage tanks, containing gasoline, were located. He noted that although the tanks had been uncovered they were being prepared for testing, and not removal. Mr. Gerber also smelled strong hydrocarbon odors in the excavation area. Mr. Gerber collected a sample of soil near one of the underground storage tanks. Shortly thereafter, he left the area. The entire incident lasted approximately ten minutes.

Mr. Gerber subsequently supplied Mr. Leonard Wood, regional manager for V-1 Oil, and V-1 Oil's attorney with a report of the investigation that occurred that day. A fuller account of the facts was accurately set forth by the District Court in its opinion, 696 F.Supp. at 579.

In presenting its Motion for Summary Judgment, the State argued that V-1 Oil had not been deprived of a constitutional right, but even if it had, that Respondent Gerber was entitled to assert the defense of good faith qualified immunity, because he had presented affidavits documenting the fact that he had relied upon advice of an assistant attorney general for the State for Wyoming, who had told him that he "could conduct a lawful and justifiable entry and inspection upon the V-1 station premises in order to investigate actual or potential sources of pollution" V-1 Oil asserts that Mr. Gerber was not entitled to immunity because his counsel's advice did not relate to the constitutionality of the statute which permitted him to make his investigation without a warrant. WYO. STAT. §35-11-109(a)(vi), (Supp. 1988). However, record does not support the Petitioner's assertion.

REASONS FOR DENYING THE WRIT

The Tenth Circuit Court of Appeals concluded that Respondent Gerber was entitled to claim the defense of good faith qualified immunity in a civil rights lawsuit brought by the Petitioner pursuant to 42 U.S.C. §1983. It came to this con-

clusion even though it agreed with the Petitioner's position that the law was clearly established that Respondent Gerber needed to obtain a search warrant prior to entering the commercial premises of the Petitioner. However, the Tenth Circuit decided that extraordinary circumstances allowed Mr. Gerber to justifiably claim good faith qualified immunity, because Mr. Gerber followed the advice of a government attorney and because the Wyoming statute had never been ruled upon by any court.

Introduction

While this case presents some issues of national importance (see Cross-petition for Writ of Certiorari presented by the Cross-petitioner), the reasons presented by the Petitioner do not justify a grant of certiorari. The issues raised by the Petitioner are extraordinarily limited and have no applicability outside the narrow context of this case.

There are no important or special reasons as required by Rule 10 of the Rules of the Supreme Court of the United States to grant the writ of certiorari.

I.

THE WRIT OF CERTIORARI SHOULD BE
DENIED BECAUSE THE ISSUE PRESENTED IS
LIMITED IN SCOPE AND IS CONSISTENT WITH
EXISTING CASE LAW.

The Tenth Circuit's decision was correct and consistent with existing case law. The decision should be allowed to stand.

It has often been held that a defendant may be entitled to qualified immunity if he relied in good faith on the advice of counsel. *Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir., 1984), *Wentz v. Klecker*, 721 F.2d 244, 247 (8th Cir., 1983), *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1495 (8th Cir., 1987), and *Burk v. Unified School District*, 646 F.Supp. 1557, 1568 (D. Kan. 1986). Cf. *Moore*

v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1348 (7th Cir. 1985).

The defense of good faith qualified immunity serves the salutary purpose of bringing a quick end actions brought pursuant to 42 U.S.C. §1983 which should never have been filed in the first place. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Malley v. Briggs*, 475 U.S. 335 (1986). Such was the case here.

The principle articulated by the Tenth Circuit in the case at bar does no more than flesh out the principle articulated in *Harlow v. Fitzgerald*, *supra*, that extraordinary circumstances may justify a good faith qualified immunity defense. 457 U.S. at 819. Because this principle is only a narrow aspect of the qualified immunity defense, review of such a limited issue would not be an efficient use of the Court's time.

Reliance on the advice of counsel by government employees, as part of the defense of good faith qualified immunity, makes good sense. It is an obvious indication of the good faith of the Respondent that he sought legal advice prior to taking any action that might have deprived a potential plaintiff of its constitutional rights. In this case, the Tenth Circuit Court of Appeals concluded that, even though the right of the Petitioner not to be inspected without a search warrant was clearly established, extraordinary circumstances nevertheless existed. Those circumstances were Mr. Gerber's reliance on the advice of a fully informed high-ranking government attorney concerning a particular statute which had never been ruled upon by any court. By virtue of such extraordinary circumstances, Respondent Gerber was prevented from knowing the relevant legal standard, and thus was able to rely on his defense of good faith qualified immunity. See 902 F.2d at 1489.

As the Supreme Court noted in *Malley v. Briggs*, 475 U.S. 335 (1986), "the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341. Respondent Gerber sought the advice of a fully-informed high-

ranking government attorney prior to commencing any inspection of the V-1 station. He followed the advice he was given. He conducted his inspection within the strictures of the inspection statute, WYO. STAT. §35-11-109(a)(vi) (Supp. 1988). Because he did not knowingly violate the law, the Tenth Circuit decision was correct and should be allowed to stand.

II.

FACTUAL DISPUTES DO NOT PRESENT A REASON TO GRANT CERTIORARI.

A writ of certiorari is not typically granted to review evidence or to discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). V-1 Oil Company has argued that the question of whether or not extraordinary circumstances existed in this case is a question which should have been submitted to a jury.

A jury was not involved in this matter, since it was appealed to the Tenth Circuit after the grant of a motion for summary judgment. The Tenth Circuit Court of Appeals could have chosen to remand the case and have it heard by a jury. But it did not do so. The Tenth Circuit was able to conclude that extraordinary circumstances existed, based upon the facts before it.

It is true that the defense of "extraordinary circumstances", so denominated, was not raised. But circuit courts of appeal may affirm a district court's opinion on any grounds for which there is a record sufficient to permit conclusions of law, even though those grounds might not have been relied upon by the district court itself. See *Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir., 1988); *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2nd Cir., 1987) and *Railway Labor Executives Association v. Staten Island Railroad*, 792 F.2d 7, 12 (2nd Cir., 1986), cert. denied, 479 U.S. 1054 (1987).

In this case, the factual determinations of the district court are wholly consistent with the factual findings of the Tenth

Circuit Court of Appeals. See *V-1 Oil Company v. State of Wyoming, et al.*, 696 F.Supp. at 579 and *V-1 Oil Company v. State of Wyoming, et al.*, 902 F.2d at 1484. V-1 Oil's Petition does disclose any discrepancies in factual interpretations. Under such circumstances, the United States Supreme Court should not undertake to review findings of fact where two courts below have concurred in those findings of fact. *Graver Manufacturing Co. v. Linde Company*, 336 U.S. 271, 275 (1949), *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967) and *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). There is no "obvious or exceptional" reason present here to review concurrent findings of fact by two courts below.

There is no need for this Court to review the factual findings nor to hold that a jury should be allowed to hear certain facts. Two courts have held that the material facts are not disputed. There is no genuine issue as to those facts. A review of such issues by the U.S. Supreme Court would result in an improper use of the Court's time and resources.

III.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS ON THE ISSUE OF EXTRAORDINARY CIRCUMSTANCES.

While a conflict between circuit courts of appeal is one of the reasons set forth in Rule 10 for granting a writ of certiorari, such a conflict is not presented in this case.

The only inter-circuit conflict which has been suggested by the Petitioner is between the instant case and *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487 (8th Cir., 1987). However, the decision in *Watertown, supra*, is wholly consistent with the Tenth Circuit decision. Both Courts agree that "extraordinary circumstances" can be the basis for granting qualified immunity:

Although *Harlow* establishes an objective test — whether the law was clearly established — it does provide under certain "extraordinary circumstances," the objective

standard may not end the qualified immunity inquiry. See 457 U.S. at 819, 102 S.Ct. at 2738 . . .

830 F.2d at 1495.

This is the same position taken by the Tenth Circuit. See 902 F.2d at 1488-89. While the court in *Watertown, supra*, reached a different conclusion regarding qualified immunity in that case, it did so because of the particular facts of the case. In *Watertown, supra*, the Eighth Circuit rejected the defense of qualified immunity, based upon reliance on the advice of counsel, because the advice was equivocal and the factual situation presented was not either perilous or one which clearly demanded prompt action. See 830 F.2d at 1496.

In the case at bar, the situation was clearly one that demanded prompt action. Respondent Gerber had to make the inspection within a certain period of time, or there was a grave risk that the ability to inspect the premises while the underground storage tanks were uncovered would be lost. See 696 F.Supp. at 583.

The cases of *V-1 Oil v. State of Wyoming, et al.* 902 F.2d 1482 (10th Cir., 1990) and *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487 (8th Cir., 1987) are quite consistent. They cite the same law in arriving at their conclusions. They arrive at different conclusions, but that is because the facts of each case are significantly different enough to justify the different conclusion in each case. There is no direct conflict between the Circuits on this question.

The Petitioner has also alleged that there is an intra-circuit conflict within the Tenth Circuit on the subject of "extraordinary circumstances." But this is not borne out by a review of the Tenth Circuit case law. The only arguable conflict would be with the case of *Melton v. City of Oklahoma City*, 879 F.2d 706, 731 (10th Cir.), *reh' en banc granted* 888 F.2d 724 (10th Cir., 1989). But the Court in *Melton* did not specifically explore the question of extraordinary circumstances. As the Tenth Circuit noted in footnote 5:

Melton instructs us not to refer to legal advice the defendant received when we decide whether or not the governing law was clearly established; it gives no guidance in deciding when a defendant should not be expected to have known the governing law.

In any event, a conflict between decisions rendered by different panels of the same circuit court of appeals is generally not a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974). Such conflicts are generally considered an intramural matter which need not be resolved by the U.S. Supreme Court. See *Wieski v. United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for writ of certiorari submitted by V-1 Oil Company sets forth no important issues of federal law to be resolved and has not shown an actual conflict between the circuit courts of appeal on the issue on which it seeks review. Petitioner's argument that a particular factual issue should be submitted to a jury for resolution is also not appropriate for review by the U.S. Supreme Court.

Respectfully submitted,

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